

Bronco Wine Company and Ralph Locke. Case 32-CA-1207

May 18, 1981

DECISION AND ORDER

On September 24, 1979, Administrative Law Judge Harold A. Kennedy issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a brief. Respondent filed cross-exceptions and a brief, including an answer to the General Counsel's exceptions.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The Administrative Law Judge found, and we agree, that Respondent violated Section 8(a)(1) by issuing a disciplinary warning to its employees Ralph Locke and Ross Theile on June 23, 1978. We disagree, however, with the Administrative Law Judge's dismissal of the complaint allegation that Respondent violated Section 8(a)(1) by discharging Ralph Locke on July 24.¹

As more fully described by the Administrative Law Judge, the chronology of events that gave rise to Locke's discharge is as follows.² As background, the record shows that Locke was hired on August 3, 1976, for one of two maintenance mechanic positions among Respondent's 35-40 employees. Approximately 9 months later, Locke received a merit increase. On January 1, 1978, Locke received a 6-month review in which he was criticized for having a "poor attitude." A union organizing campaign began in early 1978 and following a Board-conducted election the Union was certified as the employees' bargaining representative. A 3-year contract for the period beginning August 1 was negotiated and signed by the Union and Respondent on July 25.

Meanwhile, Locke had been designated shop steward on June 10. On the morning of June 22, Locke complained to Respondent's vice president, John Franzia, about Supervisor Dale Lindsey. Franzia called a meeting of the employees that same day. Locke described his objections to Lindsey's short-notice shift changes and various employees voiced other complaints. Franzia responded by telling the employees he did not believe the validity of the complaints.

¹ The complaint also alleges that Locke's discharge violated Sec. 8(a)(3). The General Counsel does not except to the dismissal of the 8(a)(3) allegation but urges that Locke's discharge violated Sec. 8(a)(1).

² Other evidence described by the Administrative Law Judge is discussed in more detail in the section of this Decision and Order applying current Board precedent to the record here, *infra*.

In the afternoon of the day of the Lindsey meeting, Franzia called Locke and Theile into his office to discuss "their attitude." The credited testimony of employee Theile is that:

John [Franzia] said he was unhappy with the way the equipment was being maintained, that the maintenance department seemed to have a rather bad attitude about the management of the company

Well, as I remember it, he said that me being an older hand and more experienced and Ralph being the steward and being free to roam through the plant checking the equipment and what not, we had a chance to possibly influence the people in talking to them. He said that he felt we should change our attitude and try to see the thing from the company's point of view. That's about all I can remember.

The following day Franzia prepared a written report covering the meeting that reads:

On June 22, 1978 I discussed with Ralph Locke, Ross Theile their attitude as employees working for Bronco Wine Co.

Fellow employees were complaining about the way they kept putting down the management and the company with regard to how the company was doing things. This was strong in the area [?] of material and parts that they needed. I explained to them the effort that we were going through to get them what they wanted and explained to them that our suppliers were slow in getting our orders filled.

I explained that if they persisted in this that it would be better if they found another job as I would not tolerate this behavior.

Franzia testified that he regarded the written report as a disciplinary warning and that he told Theile and Locke that there would be documentation of the meeting. Franzia also stated that he was disciplining Locke for "destructive type of criticism" about "management and the parts thing."

On Thursday, July 20, the air-conditioner that cooled the bottling area and other parts of the plant including the office quit. According to Respondent's official, Jack Orman, it was around 105 degrees outside that day when he asked Locke to check on the air-conditioner around 2:30 p.m. Orman testified that Locke went up on the roof twice and then reported "he couldn't fix it and it was too hot." Orman, who testified he was "disturbed" because Locke was able to repair the unit early next morning, reported the incident to Franzia the following day.

Franzia testified that he considered discharging Locke at that point but decided to "take a look at his whole background and the history of prior things that he had done up to that point." Franzia returned to work on Monday "pretty much with the decision made." He talked with Tyler (the head line operator) and Holland (a company foreman) but Franzia testified "it was just about things I already knew." At Locke's discharge interview, Franzia testified that he mentioned the air-conditioning incident, "the issue about the records," and the fact that Locke's attitude had not changed.

The Administrative Law Judge found that Locke was discharged "only because he did not perform satisfactorily as an employee." He did not believe that "Locke's organizing activities, his request for a meeting to discuss Dale Lindsey, his status as shop steward or even the many previous complaints he had voiced about management played any significant part in the decision to discharge him." Instead, he was convinced that the air-conditioning incident was the "precipitating cause of the dismissal." Hence he found that Locke was terminated for legitimate business reasons and that the General Counsel failed to prove an unlawful motive.

After the issuance of the Administrative Law Judge's Decision, the Board issued its Decision and Order on *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), setting forth the analysis to be used in discharge cases involving dual or partial motivation. The analysis requires that the General Counsel make a *prima facie* case that protected activities played a role in an employer's discharge decision. Once this is established, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

An inference that Locke's protected conduct played a role in Franzia's decision to discharge Locke is plain from Franzia's testimony. Thus, Franzia admitted that, at the discharge interview, he mentioned three specific matters, including that "Locke's attitude . . . had not changed. And that . . . by keeping him, I [Franzia] could only have a bigger problem on my hands."³ Franzia's reference

³ As more fully described in the Administrative Law Judge's Decision, Franzia also testified at the hearing that he fired Locke "for a number of reasons" One reason cited by Franzia was Locke's "attitude, being vindictive and griping all the time." In an affidavit signed on October 17, Franzia stated, *inter alia*, "I told [Locke] that despite prior discussion, his attitude had not improved," and referred to Locke's "constant criticizing of the company and how it was run."

In addition, the credited testimony of employee Theile is that Franzia told him that he (Franzia) "felt that Ralph [Locke] didn't fit in with the organization." Theile did not recall Franzia citing any other reason for Locke's discharge.

to Locke's "attitude" problem was inextricably intertwined with the subject matter of the unlawful disciplinary warning that Locke received from Franzia just 1 month earlier.⁴ Although Franzia did not testify that Locke's attitude was the sole reason for Locke's discharge, it is clear from Franzia's testimony that such conduct was a factor in the decision to discharge Locke. Accordingly, we find that the General Counsel has presented a *prima facie* case to support the allegation that Locke's discharge on July 24 violated Section 8(a)(1).⁵

We further find that Respondent has failed to demonstrate that it would have taken the same action against Locke in the absence of his engaging in protected activity. A careful review of Franzia's affidavit and testimony reveals that Franzia made no distinction among the reasons he stated for Locke's discharge.⁶ Instead, Franzia admitted that he discharged Locke "for a number of reasons," one or more of which related to Locke's work performance but another of which related to Locke's protected activity.⁷ Thus, Franzia did not testify that he discharged Locke solely on the basis of Locke's work performance, as the Administrative Law Judge found.⁸ Nor did Respondent present

⁴ The Administrative Law Judge found that Respondent violated Sec. 8(a)(1) by issuing disciplinary warnings to Locke and Theile on June 23, 1978. The credited testimony of Theile is that Franzia called Locke and Theile into his office to discuss "their attitude." It is clear from the timing of the meeting, in the afternoon of the same day as the all employees' meeting, which Franzia had called at Locke's urging, that the attitude problem Franzia referred to was complaints by Locke and Theile about the lack of "materials and parts." As the Administrative Law Judge found, these complaints related to terms and conditions of employment and were, therefore, protected concerted activity. Moreover, we note that, at this meeting, Franzia also mentioned that Locke was shop steward and had a chance to influence other unit employees. Franzia told the two men they "should change [their] attitude and try to see the thing from the company's point of view." We find that it was this same "attitude" problem that Franzia referred to at the discharge interview and in his post-discharge comments to Theile.

⁵ See fn. 1, *supra*.

⁶ Franzia testified on defense that he discharged Locke "for a number of reasons: one, refusing to do work; two, destroying company records; three, because of his attitude, being vindictive and griping all the time; and four, because of his workmanship which was poor." We note, however, that Franzia testified he mentioned the air-conditioning incident specifically, but not Locke's poor work performance generally, at the discharge interview.

⁷ See fn. 4, *supra*.

⁸ As described above, the Administrative Law Judge was convinced that Franzia terminated Locke only because Locke did not perform satisfactorily as an employee. This finding by the Administrative Law Judge flies in the face of the record evidence generally and Franzia's testimony specifically that Franzia discharged Locke "for a number of reasons." See fn. 6, *supra*. Thus, the Administrative Law Judge in effect substituted his judgment that Locke's work performance warranted discharge for record evidence establishing such as the sole or determining reason for Locke's discharge. This finding also is at odds with *Wright Line* (issued after the Administrative Law Judge's Decision) that, where the employer has been unable to carry its burden to demonstrate that it would have taken the same action in the absence of protected activity, the Board will not seek to analyze quantitatively the effect of the unlawful cause once it has been found. See *Wright Line*, *supra* at 1089, fn. 14.

Continued

evidence indicating the standards or procedures it applies in discharging an employee for poor work performance.⁹ We are left, instead, with an admission by Respondent's official responsible for the discharge that he considered, and relied on, activities by Locke that we have found to be protected in arriving at the decision to discharge Locke and no evidence indicating that Respondent would have taken the same action against Locke in the absence of such protected activity.¹⁰ Thus, we find that Respondent's discharge of Ralph Locke violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Winery, Distillery and Allied Workers Union Local 186, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By issuing a disciplinary warning to its employees Ralph Locke and Ross Theile on June 23, 1978, and by discharging Ralph Locke on July 24, 1978, Respondent interfered with, restrained, and coerced them in the exercise of rights guaranteed them by Section 7 of the Act and thereby engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

REMEDY

Having found that Respondent violated Section 8(a)(1) of the Act, we shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Bronco Wine Company, Ceres, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

We also note that the Administrative Law Judge's findings are couched in conclusionary terms and that he did not describe the evidence or testimony he relied on to reach his result.

⁹ Franzia talked with Locke about his work habits on January 3, 1978. The only other time Franzia talked with Locke about his work performance was in connection with the June 22 conference with Locke and Theile. But the timing of this conference, coupled with the thrust of Franzia's remarks (fn. 4, *supra*), makes clear that it was the employees' attitude that gave rise to the meeting rather than their work habits.

¹⁰ Although there is substantial record evidence to support a finding that Locke did not perform satisfactorily as an employee, there are circumstances here, coupled with the absence of evidence of Respondent's standards or procedures for discharging employees because of poor work performance, that would cast a shadow over a claim by Respondent that Locke was discharged only because of poor work performance. In view of our finding here, including the fact that we are not finding a pretextual discharge, it is unnecessary to develop these circumstances.

(a) Discouraging protected concerted activities of its employees by issuing disciplinary warnings to, or by discharging, them.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action:

(a) Offer Ralph Locke immediate and full reinstatement to his former position or, if it no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any loss of pay he may have suffered by paying to him a sum of money equal to the amount he would have earned from the date of discharge, less his earnings during said period, to be computed as set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).¹¹ See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Ceres, California, facility copies of the attached notice marked "Appendix."¹² Copies of said notice, on forms provided by the Regional Director for Region 32, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by other material.

(d) Notify the Regional Director for Region 32, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

¹¹ Member Jenkins would compute interest on backpay in accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

¹² In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT discourage or in any way interfere with our employees' exercise of their Section 7 rights by discharging them.

WE WILL NOT issue disciplinary warnings to employees for engaging in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them under Section 7 of the National Labor Relations Act.

WE WILL offer Ralph Locke immediate and full reinstatement to his former job or, if it no longer exists, to a substantially equivalent job, discharging, if necessary, any employee hired to replace him.

WE WILL restore Ralph Locke's seniority and other rights and privileges and WE WILL pay him the backpay he lost because we discharged him, with interest.

BRONCO WINE COMPANY

DECISION

STATEMENT OF THE CASE

HAROLD A. KENNEDY, Administrative Law Judge: The complaint herein, issued on November 15, 1978, alleges that Respondent Employer, Bronco Wine Company of Ceres, California, violated Section 8(a)(3) and (1) of the National Labor Relations Act on or about July 24, 1978,¹ by discharging (and by refusing to reinstate) an employee named Ralph Locke. Locke had filed a charge against Respondent on September 8. The complaint was amended on March 19, 1979, so as to allege also that Respondent, acting through its agent and supervisor, John Franzia, violated the Act by issuing "disciplinary warnings to its employees Ralph Loche [sic] and Ross Theile."

This case was heard before me in Ceres, California, on March 27, 1979.² Respondent concedes the jurisdictional facts and a number of other matters. The pleadings establish that Respondent is an employer engaged in commerce and in a business affecting commerce within the

meaning of Section 2(2), (6), and (7) of the Act. Respondent is a California corporation engaged in the production and sale of wine to retail and nonretail customers. It grossed over \$500,000 during the past year; it sold goods and services valued in excess of \$50,000 to out-of-state customers during the same period.

Respondent admits that John Franzia, vice president and treasurer of Bronco Wine Company, is an agent and a supervisor of Respondent. Winery, Distillery and Allied Workers Union Local 186, AFL-CIO, is a labor organization within the meaning of the Act.

The Union held a campaign to organize Respondent's employees in early 1978. An election was held, and the Union was thereafter certified as the employees' bargaining agent. A collective-bargaining agreement for the 3-year period beginning August 1 was negotiated and signed by the Union and Respondent on July 25. Locke was designated shop steward on June 10.³

The size of Respondent's payroll varies, depending on the time of the year, but it employs between 35 and 40 employees on the average. They work in four different departments—office, bottling, shipping, and maintenance. A substantial number of Respondent's employees work in the bottling department. Ralph Locke and Ross Theile were the only maintenance employees. Theile was the more senior employee having been employed by Respondent when the business began more than 5 years ago. Theile disclaimed having expertise as an electrician, referring to himself as a "maintenance mechanic." Locke testified that he "was hired as a maintenance mechanic to do electrical work." He assisted Theile and was being paid at an hourly rate of \$7.94 at the time of his termination. Locke said he started working for Respondent on August 3, 1976, and received one merit raise about 9 months later. He said he also received cost-of-living raises during the period of his employment.

Locke worked throughout the plant. He said he usually received instruction on what work to do from Theile but stated that he also received instruction from Vice President Franzia, Production Supervisor Dale Lindsey, Purchasing Agent Jack Orman, and others. Said Locke: "Anybody who had a problem, if something wasn't working, they would come and tell me that there was something malfunctioning and I would work on it."

John Franzia, who discharged Locke on Monday, July 24, 1978, said he prepared a written report of the termination. The report states:

Ralph Locke was terminated 7/24/78 because of the following reasons: On 1/3/78 I discussed with Ralph his 6 month review. At that time I told him that he had a poor attitude with regards to his job and it was effecting [sic] his work habits. At that time I explained to him that we would need to see some improvements if he hoped to progress.

¹ All dates refer to the year 1978 unless otherwise stated.

² Certain errors in the transcript are hereby noted and corrected.

³ The president of Local 186, Ben Koch, testified that he made appointments of shop stewards after obtaining "a consensus of the employees." A union meeting of Bronco employees was held on June 10 at which Locke was selected, the only candidate for the job. Locke volunteered for the job. Leonard Shaver had been previously proposed for the position, but he had refused it.

Again on 6/23/78 I had another meeting with Ralph and told him at the time if his attitude and work habits did not improve he should look for another job. (See. A.V.O. 6/23/78)

On 7/24/78 I terminated Ralph Locke as he had not shown any improvement in his attitude or work habits. He was unwilling to carry out job responsibilities and would not actively look for work in areas that needed maintenance attention.

Franzia testified on defense that he fired Locke "for a number of reasons: one, refusing to do work; two, destroying company records; three, because of his attitude, being vindictive and griping all the time; and four, because of his workmanship which was poor." In an affidavit signed on October 17, Franzia had stated:

I told Locke on July 24, 1978 around 9 a.m. he was being discharged because of his failure to do his job in general and the air conditioner in particular. I told him that despite prior discussion, his attitude had not improved. I reminded him of the incident involving finding the maintenance records.

These passages, read into the record on cross-examination, were also in the affidavit:

... I thought about the failure to perform work, the excessive breaks, poor attitude, and constant criticizing of the company in how it was run. His soapbox approach predated his becoming shop steward. He used to complain about the lack of overtime.

Franzia indicated in his testimony that he and two cousins owned Bronco Wine and that the business had been given to them by their relatives. Franzia was resentful of reports that Locke had criticized "the way the company was being run and [the fact that the three boys] were given everything." Franzia also obviously resented Locke's complaint about the lack of overtime, noting that "overtime costs the company money." Franzia stated that as junior man (to Theile) Locke had to take the odd or night shifts. Franzia said he did not understand Locke's complaint, although he acknowledged that Locke had explained the desirability of having line changes made with two maintenance people working together. Locke's explanation for his request, given during cross-examination, seemed reasonable enough:

Q. What was the problem with overtime?

A. The problem was with the way they were scheduling the line changes. It's as I stated before, I wouldn't know until I went home at 3:30, which is an hour before everybody else. A lot of times, the bottling schedule wasn't up. Dale Lindsey would come and tell me as I was leaving that I would have to come to work at 3:30 tomorrow because there was a line change. I felt that on such short notice, if the company needed that line change that bad, that they could at least pay the overtime for having it done. . . .

Q. By a bottling line change, were you referring to a readjustment in the bottling assembly line so that it takes a different size bottle?

A. Right.

Q. And a different label, maybe?

A. Right. . . . Sometimes we would maybe change it once a week.

Q. Was the change of the bottling line done after the bottling line employees had knocked off for the day and gone home usually?

A. Yes. . . .

Q. How long does a bottling line change take normally?

A. It depends on the change that you are making and how many people are working on it.

Q. What did you want to do about adjusting that change?

A. Before Dale Lindsey came, Ross and I would stay over and change the line over before we went home. There was a policy of no overtime, or as little as possible.

When Dale came, he would have me come in at 3:30 and change the line over by myself.

Franzia maintained that Locke's request for overtime did not enter into the decision to terminate him.

Franzia said he had told Locke during the January 3 meeting that he (Locke) had shown "very little initiative" and that his attitude was affecting other employees. Franzia stated that he told Locke that he was not being given a raise and that "Locke agreed that he did have a poor attitude."

Locke came to Franzia on the morning of June 22 to complain about Dale Lindsey. Franzia stated that others had also complained about Lindsey and that he called a special meeting of all hourly employees that morning in an effort to get the employees to "work together." Locke voiced his complaint first at the meeting:

I stated what my complaint with Dale Lindsey was. He did not give me enough time before he changed my shift. I would be working days and when I got ready to go home that very same day, he would notify me then that I would have to come in the next day on the swing shift.

Others then voiced their objections after which Franzia replied to the effect that he did not believe the validity of their complaints. Franzia's comments prompted Theile to say, "John, you just called everybody in this room a liar." Franzia denied calling the employees liars but asserted that he did have confidence in Lindsey.

On the afternoon of the same day, Franzia called Theile and Locke into his office to discuss "their attitude." Theile testified credibly as follows concerning the meeting:

John said he was unhappy with the way the equipment was being maintained, that the maintenance department seemed to have a rather bad attitude about the management of the company

Well, as I remember it, he said that me being an older hand and more experienced and Ralph being the steward and being free to roam through the plant checking the equipment and what not, we had a chance to possibly influence the people in talking to them. He said that he felt we should change our attitude and try to see the thing from the company's point of view. That's about all I can remember.⁴

On the following day Franzia prepared an "AVO" (abbreviation for "Avoid Verbal Orders") written report covering the meeting with Theile and Locke. The report, received as General Counsel's Exhibit 4, reads:

On June 22, 1978 I discussed with Ralph Locke, Ross Thiele their attitude as employees working for Bronco Wine Co.

Fellow employees were complaining about the way they kept putting down the management and the company with regard to how the company was doing things. This was strong in the area [?] of material and parts that they needed. I explained to them the effort that we were going through to get them what they wanted and explained to them that our suppliers were slow in getting our orders filled.

I explained that if they persisted in this that it would be better if they found another job as I would not tolerate this behaviour.

Franzia testified at one point that Theile was at the June 22 meeting only because he was "senior man" and that he had criticized the Company only in connection with its failure to get parts. But Franzia also testified that he regarded the AVO memo as a disciplinary warning and that he told Theile and Locke that there would be a documentation of that meeting. Franzia stated that he was disciplining Locke for "destructive type of criticism" about "management and the parts thing."

According to Franzia, fellow employees got tired of hearing Locke complain; "if it started on the parts, it turned around and ended up about the company." Franzia thought that there were not many complaints about parts after the June 22 meeting with Locke and Theile. Asked if the June 22 meeting was involved in Locke's termination, Franzia replied that it was "just one more straw." Franzia denied that Locke's complaint about Lindsey was a factor in deciding to terminate Locke, however. Franzia said he called the meeting of employees that day to get the departments "to pool [sic] together," not to discuss Lindsey.

Franzia testified that Orman had told him that Locke had thrown a cardex file into the garbage can. Franzia said he spoke to Locke about it and that Locke had replied that the records were not being kept up. Orman testified that he had given to Locke, at Locke's request, a cardex file to use in keeping "track of the equipment

and repairs." He said he later found the file in the trash bin. The file, he said, had "some entries" in it. Orman stated that Locke had later told him that "he threw them out the window" as "[t]hey were no good anyhow."⁵

Franzia testified that "Bob Holland just complained in general about Ralph Locke not being able to get things done in the cellar." Theile complained, he said, that "Ralph did things that he had to redo." Theile agreed that he had stated "several times that Ralph was slow." Theile denied saying that Locke was lazy but did agree that "Monday wasn't his best day."

Franzia stated that Gloria Tyler, the Company's head line operator and a bargaining unit employee, complained that Locke did not set up the bottling lines properly. Tyler testified that she did complain periodically about Locke. She indicated that Theile could set up the lines better than Locke. Tyler considered Locke uncooperative and therefore tried to deal only with Theile in the maintenance department. She said that Locke read on the job and was a slow worker.

Franzia testified that hourly employees had complained that "Ralph or the maintenance department" had taken longer coffee and lunch breaks than others. Franzia referred to an earlier memorandum (G.C. Exh. 9, dated March 14, 1977) of another Bronco official, Bob Darby, which referred to "a verbal warning" given to Theile and Locke "for the length of their [breaks] and lunches."

Franzia regarded "the air conditioning incident" of Thursday, July 20, as "the final straw." Franzia was away at the time and returned to the Company's plant on the following day. Franzia testified that shortly after his return Orman reported that Locke had refused to repair the air-conditioner that cooled the bottling area and other parts of the plant, including the office where approximately 10 employees worked. The air-conditioner, which often malfunctioned in hot weather, had quit on that day. Orman had asked Locke to go onto the roof where the air-conditioning unit was located and attempt to repair it. As Franzia recalled Orman's report to him, Locke went up on the roof, returned, and then reported that "it was too hot and that he would fix it tomorrow morning." Quoting Franzia's testimony:

A. I felt that the air-conditioner had to be fixed. He was asked to fix it. Not only was he asked to fix it, people were in an area where they needed the air-conditioning. He did not even make an attempt to fix it, and then left and came back the next morning and fixed it within an hour after he went up there.

To me, it was a refusal of doing work.

Q. Did you think about terminating him at that point in time?

A. Yes. I think that crossed my mind. However, I really wanted to take a look at his whole background and history of prior things that he had done up to that point. I did that.

⁴ Locke also testified that Franzia on June 22 referred to the fact that Locke was the shop steward. Franzia maintained that he did not learn that Locke was shop steward until 3 weeks later when he returned from vacation. I am of the view that Franzia did know of Locke's status as a steward on June 22 but had forgotten that fact at the time of the hearing. Unquestionably Franzia knew Locke was shop steward at the time of the discharge, but I find such fact was not a factor in Franzia's decision to discharge Locke.

⁵ Locke's testimony on this point is discussed later.

Franzia said he considered the matter over the weekend and returned to work on Monday "pretty much with the decision made." After talking with Gloria Tyler and Bob Holland, Franzia said he called in Locke and discharged him. Franzia said he mentioned the air conditioner incident, "the issue about the records" and his attitude, which he said "had not changed."

Jack Orman, the Bronco official in charge of purchasing "and other things," testified that it was probably around 105 degrees outside the day the air-conditioner quit. Orman said he asked Locke to check on the air-conditioner around 2:30 p.m. According to Orman, Locke went up on the roof twice and then reported "he couldn't fix it and it was too hot." Orman concluded that Locke was refusing to repair the air-conditioner. Orman said he was "disturbed" by the fact that Locke had been able to repair the unit by 7:30 on the following morning by bypassing a relay. Orman said he reported the incident and "various things" to Franzia about Locke.⁶

Bob Holland, the company cellar foreman, recalled that Locke had told him one day in July that "they want me to work on the air conditioner, but it's too hot." "I'll do it later." Holland thought he had seen Locke on the roof twice on that day. Holland testified that he had complained to Franzia about Locke several times. He regarded Locke as slow and lazy.

Ralph Locke testified that he thought that he was fired "because of my union activities." He stated that on July 24, the day he was dismissed, Franzia referred to Locke's attitude and the fact that he was "no longer comfortable with me." Also, Franzia told Locke that he had been "disrespectful to the point of insubordination at times" but said nothing about his failure to repair the air-conditioner or the disposition made of any maintenance records.

Locke said he had heard a lot of complaints from fellow employees about the Company and that he had voiced some himself. He said he had pointed out to fellow employees "some of the good things about the Union, like the health plan, the retirement plan and the glowing discrepancies between those and what the company offered." Locke said he had been active in organizing the Company's employees and had said bad things about the Company. Locke recalled telling employees that company talk about construction of a new warehouse was "just a farce." Locke testified that he mentioned at a group meeting chaired by Franzia that he thought the Company should put some of its profits into employees' profit-sharing plan rather than reinvest all of it in plant expansion.

Locke stated that he had agreed with Franzia in January that his attitude had been poor. He also agreed that he had told Gloria Tyler that he worked only at a slow speed. It is apparent that Locke had difficulty making line changes, although he denied that he did. He conceded that Tyler, the head line operator, usually asked Theile, whom he described as a "maintenance mechanic" specialized in "fixing machinery," for help rather than

him. Locke also agreed that he was "down" on some Mondays.

Locke explained that he had spoken to Jack Orman about the need for a filing cabinet in which to keep records on "inside" equipment. Orman offered him a green folder and some inventory cards.⁷ Locke thought he may have put some headings on the cards but no information about equipment on them. After "shifting this stuff around," Locke said he took the folder and the cards and placed them on Orman's desk. He said he "probably said something like if I don't have any place to keep this there's no use in having it out here." Locke said Franzia thereafter approached him and asked, "what I thought I was going to accomplish by throwing those on Jack Orman's desk." He stated that his response was, "it got this meeting with you," but he denied that he threw away any records.⁸

Locke said the air-conditioner was a continual problem in the summer when the weather would be hot and the unit would be "blowing fuses and tripping out." The installer of the air-conditioner, one George Schuler, was frequently called to repair it, and Locke would work on the unit two or three times a month. Locke denied that he refused to work on the unit on July 20 as Respondent's officials claimed. According to Locke, "somebody" mentioned that the air-conditioning was not working around 3:40 p.m. after he had punched out. No one specifically asked him to repair it that day, he said, and he went home. He stated that it was hot that day, and he did not go onto the roof at all. Locke said he commented that it was "too hot" to go up on the roof but said it "just like a joke." Locke said he was able to get the air-conditioner going early the next morning when "it was much cooler" by simply bypassing the timer. He did not believe it was "the real problem," however, and he discussed the matter with Theile at the time.

I am unable to conclude that Franzia terminated Locke because he "joined or assisted the Union or engaged in other protected concerted activities," as the complaint alleges. There is nothing in the record to suggest Respondent harbored any union animus or was disposed to discriminate against employees because of their union activities. Respondent concedes, in effect, that it knew Locke had engaged in union activities and that Locke had become shop steward before his termination. And I accept the General Counsel's argument that Locke's protests with respect to supply of parts and management relate to terms and conditions of employment, and were therefore protected activities under the Act.⁹ I

⁷ As indicated above, Orman and Franzia said Locke was given a "cardex file."

⁸ Even if Locke's account of the incident is fully accepted, it is understandable that Orman and Franzia believed Locke had thrown records away. Locke indicated that after being reprimanded he took the records back to his shop and "put them on top of the file." Obviously they could have then easily found their way into the trash. Locke also spoke to Franzia about better "parts control" with the idea of placing all parts in one location. The suggestion was apparently not acted on. Franzia said he "agreed with him to a point," but claimed that "in some cases it just wasn't feasible."

⁹ Theile joined in the complaints Locke had voiced against the Company.

⁶ Orman also complained that Locke did not run a hot melt through a glue machine, that Locke was of little value on Monday, and that Locke was critical of the Company for not having parts on hand (some of which he said Locke could have ordered himself).

am convinced that Franzia terminated Locke only because he did not perform satisfactorily as an employee. Conceivably Locke may not have understood that Orman was directing him to try to repair the air-conditioner on the afternoon of July 20. And perhaps Locke did intend to speak in jest when he indicated that it was too hot to consider working on the air-conditioning unit that afternoon. But understandably, Orman and Franzia took Locke's conduct to be a refusal to work. I am unable to believe that Locke's organizing activities, his request for a meeting to discuss Dale Lindsey, his status as shop steward, or even the many previous complaints he had voiced about management played any significant part in the decision to discharge him. I find it difficult to believe that Franzia did not mention the air-conditioning incident on July 24 at the time of the discharge as Locke claimed. But whether referred to or not, I am convinced that it was the precipitating cause of the dismissal. I find Locke was terminated for a legitimate business reason and hold that the General Counsel failed to prove an unlawful motivation.¹⁰

The warning given to Locke and Theile on June 22 presents a different question, however. It can hardly be disputed that the complaints about the lack of "materials

and parts" that each of these employees had voiced related to terms and conditions of employment and were, therefore, protected concerted activities. See, for example, *Oklahoma Allied Telephone Co., Inc.*, 210 NLRB 916 (1974). Franzia testified that he considered what he had said to Locke and Theile that day concerning their complaints about materials and parts to be a disciplinary warning and that it was important enough for there to be "documentation of that meeting" so that the matter would not be forgotten. The issuance of such a warning violated Section 8(a)(1) of the Act, and the repetition of such behavior will be enjoined in my recommended Order.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Winery, Distillery and Allied Workers Union Local 186, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By issuing a disciplinary warning to its employees Ralph Locke and Ross Theile on June 22, 1978, Respondent interfered with, restrained, and coerced them in the exercise of rights guaranteed them by Section 7 of the Act and thereby engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. No other violation of the Act was established.

[Recommended Order omitted from publication.]

¹⁰ Even if Respondent had been looking for an opportunity to discharge Locke, the fact that he had engaged in concerted activities would not necessarily have made the firing unlawful. See *Golden Nuggett, Inc.*, 215 NLRB 50 (1974), and *Fikse Bros., Inc.*, 236 NLRB 1351 (1978). But the record here does not suggest that Respondent had become so concerned with Locke's protected concerted activities that it would seek an opportunity to discharge him.